No. 02-371

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

KEVIN LAMONT HICKS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant whose non-expressive conduct violates a regulation limiting access to government property may bring a facial overbreadth challenge to that regulation on the ground that its application to expressive conduct would violate the First Amendment.

2. Whether the degree of discretion that officials may exercise to permit individuals to enter government property in order to engage in expressive conduct varies depending on whether that property is a public forum.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. Respondent's facial challenge to the Housing Authority's trespass policy should not have been entertained	10
A. The overbreadth doctrine is a limited exception to the general rule permitting only as-applied constitutional adjudication	12
B. An overbreadth challenge may not be brought by one not engaged in expressive activity subject to the challenged regulation	14
C. Facial overbreadth challenges may not be brought to laws of general applicability	17
D. The Housing Authority's trespass policy is not in any event substantially overbroad	22
II. Even if respondent may bring this overbreadth challenge, the Virginia Supreme Court erred in determining that the Housing Authority's trespass policy violates the First Amendment	22
A. The constitutionality of the regulation in this case likely turns on the forum classification of the government property at issue	23
B. The Virginia Supreme Court erred because it failed to decide whether the property was a public forum	26
Conclusion	30

TABLE OF AUTHORITIES

Cases: Page

Adderley v. *Florida*, 385 U.S. 39 (1966) 25
Ashcroft v. *ACLU*, 535 U.S. 564 (2002) 15
Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 14
Barrows v. *Jackson*, 346 U.S. 249 (1953) 12
Bates v. *State Bar of Ariz.*, 433 U.S. 350 (1977) 14
Board of Airport Comm'rs v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) 15
Board of Trs. of the State Univ. of New York v. *Fox*, 492 U.S. 469 (1989) 16
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 12, 13, 14, 15, 22
Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 15
City of Chicago v. *Morales*, 527 U.S. 41 (1999) 11
City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 17
City of Dallas v. *Stanglin*, 490 U.S. 19 (1989) 11
City of Lakewood v. *Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) 15, 18, 19, 20, 21, 24
Cornelius v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) 7, 23
Cox v. *Louisiana*, 379 U.S. 536 (1965) 20
Daniel v. *City of Tampa*, 38 F.3d 546 (11th Cir. 1994), cert. denied, 515 U.S. 1132 (1995) 25-26
Department of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) 2
Edwards v. *South Carolina*, 372 U.S. 229 (1963) 20
First Unitarian Church of Salt Lake City v. *Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002) 27, 29
Forsyth County v. *Nationalist Movement*, 505 U.S. 123 (1992) 14, 19, 24
Frisby v. *Schultz*, 487 U.S. 474 (1988) 23

Cases—Continued: Page

Gooding v. *Wilson*, 405 U.S. 518 (1972) 13, 15
Greer v. *Spock*, 424 U.S. 828 (1976) 1, 26-27
Hale v. *Department of Energy*, 806 F.2d 910 (9th Cir. 1986) 24
Hawkins v. *City & County of Denver*, 170 F.3d 1281 (10th Cir.), cert. denied, 528 U.S. 871 (1999) 27-28, 29
International Society for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672 (1992) 28, 29
Kunz v. *New York*, 340 U.S. 290 (1951) 24
Los Angeles Police Dep't v. *United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) 13
Lovell v. *City of Griffin*, 303 U.S. 444 (1938) 15, 24
Marsh v. *Alabama*, 326 U.S. 501 (1946) 21
New York v. *Ferber*, 458 U.S. 747 (1982) 13, 14, 15, 22
Niemotko v. *Maryland*, 340 U.S. 268 (1951) 24
Osborne v. *Ohio*, 495 U.S. 103 (1990) 14
Parker v. *Levy*, 417 U.S. 733 (1974) 14
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 24, 26
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 20
Shuttlesworth v. *City of Birmingham*, 394 U.S. 147 (1969) 15, 24
Thomas v. *Chicago Park Dist.*, 534 U.S. 316 (2002) 15, 19
Thornhill v. *Alabama*, 310 U.S. 88 (1940) 15
United States Postal Serv. v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 1, 24, 25
United States v. *Albertini*, 472 U.S. 675 (1985) 27
United States v. *Grace*, 461 U.S. 171 (1983) 1, 10, 25, 28, 29
United States v. *Kokinda*, 497 U.S. 720 (1990) 1, 23, 26, 27, 29
United States v. *Raines*, 362 U.S. 17 (1960) 13
Watchtower Bible & Tract Soc'y of New York, Inc. v. *Village of Stratton*, 536 U.S. 150 (2002) 14

Constitution, statutes and regulation:	Page
U.S. Const. Amend. I	*passim*
42 U.S.C. 1437 *et seq.*	1
Va. Code Ann. § 18.2-119 (Michie 2002)	3
24 C.F.R. 966.4(d)(1)	1
Miscellaneous:	
The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970)	19
Model Penal Code (1980)	3

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INTEREST OF THE UNITED STATES

The United States has ownership and other interests in a wide variety of types of property and therefore has an interest in the substantive and procedural standards that govern challenges to the regulation of public activities, including expressive activities, on such property. See, *e.g.*, *United States* v. *Kokinda*, 497 U.S. 720 (1990) (post office sidewalk); *United States* v. *Grace*, 461 U.S. 171 (1983) (Supreme Court grounds); *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal letterbox); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base). In addition, the United States assists public housing agencies in financing the development, acquisition, and operation of low-income housing projects. 42 U.S.C. 1437 *et seq.* Accordingly, the United States has a substantial interest in the ability of local housing agencies to take steps to ensure tenants' safe use and enjoyment of the housing premises, as well as the ability of the tenants to have reasonable accommodation made for their guests. See 24 C.F.R. 966.4(d)(l); see also

Department of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002).

STATEMENT

1. This case involves Whitcomb Court, a troubled public housing development in Richmond, Virginia. The development had been described as an "open-air drug market," and "[t]he majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there." Pet. App. 3. In an effort to address those problems, the Richmond Redevelopment and Housing Authority, a political subdivision of the Commonwealth of Virginia and the owner and operator of Whitcomb Court, sought to limit access to the property. In 1997, the City of Richmond, which owned the streets located within Whitcomb Court, passed an ordinance declaring that the streets in the development were "closed to public use and travel" and conveyed title to the streets to the Housing Authority. *Ibid.* The deed conveying title required the Housing Authority to "make provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets[.]" *Ibid.*

The Housing Authority accordingly placed signs on the housing development's buildings and every 100 feet along the streets, stating, *inter alia*, "NO TRESPASSING," "YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA," and "UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION." Pet. App. 4. At the same time, the Housing Authority authorized the Richmond Police to serve notice on any unauthorized person on Housing Authority property forbidding that person to return to such property if "such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises." *Id.* at 98. In addition, the Housing Authority gave the police the authority to arrest any person who, "having been duly notified, either stays upon or returns to" Housing Authority property. *Id.* at 98-99.[1]

According to the Supreme Court of Virginia, under the Housing Authority's policy, "individuals who sought access to the Housing Authority's property, including the streets, needed to obtain * * * permission for such access" from Gloria Rogers, the manager of Whitcomb Court. Pet. App. 5. She "was required to determine whether a person can demonstrate a legitimate business or social purpose to use the Housing Authority's property * * * including the streets." *Ibid.* In particular, a person who wanted "to disseminate materials or participate in an activity on the property" had to obtain permission from Rogers. *Ibid.* If a person requested access to the property from Rogers, she sometimes "referred such request to a 'community council' which met with 'the [Whitcomb Court] Board and the residents." *Ibid.* In addition, "if an individual submitted a request to distribute flyers and the request was not 'routine,' she referred that request to the Housing Authority's director of housing operations for resolution." *Ibid.* Aside from the general "legitimate business or social purpose" guideline,

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[1] Under Virginia's notice-trespass statute, Va. Code Ann. § 18.2-119 (Michie 2002), a person who enters the property of another after having received notice not to do so is guilty of the misdemeanor of trespassing. The statute provides:

> If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, * * * after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons * * * at a place or places where it or they may be reasonably seen * * * he shall be guilty of a Class 1 misdemeanor.

See Model Penal Code § 221.2, cmt. 1 (1980) ("The common thread running through [criminal trespass statutes] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter.").

there were no written policies or procedures governing "decisions regarding who may distribute materials or participate in activities on the Housing Authority's property." *Ibid.*

2. On January 20, 1999, respondent was arrested for trespassing on the sidewalk on Bethel Street, a street that is entirely encompassed within Whitcomb Court and passes through the middle of the property. Pet. App. 6, 32, 97. Respondent's mother, his baby, and the baby's mother live at Whitcomb Court. *Id.* at 32. When he was arrested, respondent stated that he was delivering diapers to his baby. *Ibid.* Respondent had earlier been convicted of trespassing on Whitcomb Court property on February 10, 1998, and June 26, 1998, and he had been convicted of damaging property on Whitcomb Court on April 27, 1998. *Id.* at 6, 32. On April 14, 1998, before his second conviction for trespassing and his conviction for damaging property, Rogers delivered him a letter informing him that "effective immediately you are not welcome" on Housing Authority property, that "you are not to trespass on [Housing Authority] property," and that "[i]f you are seen or caught on the premises, you will be subject to arrest by the police." *Id.* at 107.

Respondent was charged with violating Virginia's notice-trespassing misdemeanor statute. See note 1, *supra*. He was tried and convicted on that charge in the City of Richmond General District Court. Pet. App. 2. He appealed his conviction to the Circuit Court of the City of Richmond, where he was again convicted after a bench trial. *Id.* at 82-85.

3. After a panel of the intermediate state appellate court ruled that his conviction should be affirmed, Pet. App. 59-81, the en banc court reversed by a 6-5 vote, *id.* at 28-58.

The majority stated that "[t]he critical issue is whether the 'privatized' streets and sidewalks are public and as such are a 'traditional public forum,' or whether they are 'private' and, thereby, a 'nonpublic forum.'" Pet. App. 34. The court

held that the city "is not permitted to transform the public streets and sidewalks in Whitcomb Court into private, nonpublic property simply by passing an ordinance declaring them closed, conveying them to another governmental entity, [the Housing Authority], and placing signs along the streets." *Id.* at 38. Having concluded that the streets in Whitcomb Court remained a public forum, the court held that the restrictions on access were not narrowly tailored to serve the interest in crime control. *Id.* at 41.

The five dissenting judges would have barred respondent from raising this "untimely and improper collateral attack on his barment status," because he had not taken advantage of judicial opportunities at the time of his prior trespassing convictions and administrative opportunities since that time to challenge his barment. Pet. App. 45. They also would have held that respondent's First Amendment overbreadth challenge cannot succeed, because the constitutional reach of the trespass policy "dwarfs its arguably impermissible applications." *Id.* at 49. The dissent also argued that the street on which respondent was arrested was no longer a traditional public forum, because it had been deeded to the Housing Authority, the Housing Authority had posted no-trespassing signs, and the property had been treated as private for at least a year before respondent's arrest. *Id.* at 52. In the dissent's view, "there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow of traffic." *Ibid.* The dissent concluded that "any potential interference with an individual's right of expression * * * is reasonable, limited and justified to achieve the legitimate purpose of protecting [Whitcomb Court] residents from crime." *Id.* at 54.

4. a. The Supreme Court of Virginia affirmed. The court framed "[t]he narrow issue * * * in this appeal" as "whether a redevelopment and housing authority's trespass policy is overly broad and thereby violates the First and

Fourteenth Amendments." Pet. App. 2. The court stated that "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible." *Id.* at 9.

In this case, the Court held that "[e]ven though the Housing Authority's trespass policy * * * is designed to punish activities that are not protected by the First Amendment, the policy also prohibits speech and conduct that are clearly protected by the First Amendment." Pet. App. 13. In particular, the court observed that Rogers, the manager of the property, "has unfettered discretion to determine who can distribute literature" at the project and that "a non-resident of Whitcomb Court can only distribute such literature if that non-resident obtains authorization from Rogers." *Id.* at 14-15. The court stated that "Rogers has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment." *Id.* at 16. On that basis, the court concluded "that the Housing Authority's trespass policy is overly broad and that [respondent] may assert this issue in this criminal prosecution." *Id.* at 17.

The court recognized that "the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum and that the Housing Authority's efforts to regulate speech in that forum contravene the First Amendment." Pet. App. 16. But, the court stated, in light of what it characterized as its "limited holding," it "need not resolve this issue" but would instead "reserve consideration of this issue for another day." *Ibid.*

b. Justice Kinser, joined by one other member of the court, dissented. In his view, the court erred in holding that

respondent could bring this facial challenge. He pointed out that this Court's cases cited by the Virginia Supreme Court in support of its conclusion that respondent's facial challenge is permissible each "addressed a statute requiring a license or permit to engage in First Amendment activity." Pet. App. 18. But "[b]ecause the Authority's trespass policy does not directly regulate activity protected by the First Amendment, but instead limits access to government property, * * * these cases are not persuasive authority to justify the defendant's facial challenge to the trespass policy." *Id.* at 19. Because the Housing Authority's trespass policy at issue in this case "is directed at conduct, namely trespassing, and not pure speech," *id.* at 21, the dissent explained that it must be shown to be "substantially overbroad" before it can be attacked through a facial challenge, *id.* at 22. The dissent concluded that, because the policy's legitimate sweep in regulating trespassing on government property is much greater than any impermissible applications, respondent could not make such a showing. *Ibid.*

The dissent also concluded that "if a facial challenge is to be allowed in this case, it should be analyzed under the framework established by the Supreme Court for deciding when an individual's First Amendment rights have been violated by a denial of access to government property." Pet. App. 23. In particular, "the nature of the forum must * * * be identified, 'because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.'" *Ibid.* (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

SUMMARY OF ARGUMENT

I. Respondent was not engaged in expressive activity when he violated the Housing Authority's trespass policy. Accordingly, respondent's First Amendment challenge to that policy may proceed only as an overbreadth challenge—*i.e.*, only on the ground that the policy is unenforceable

against him because it would be unconstitutional as applied to others who *are* engaged in expressive activity. Allowing such third-party challenges imposes serious costs. It restricts society's ability to enforce its laws against persons whose conduct is constitutionally unprotected. It also requires courts to decide constitutional issues in an entirely abstract context. And it may lead to the premature and unnecessary resolution of serious constitutional questions. Although the overbreadth doctrine permits First Amendment challenges to be brought to substantially overbroad statutes in limited circumstances to avoid a chill to the expressive rights of parties not before the court, the doctrine's application is limited. It should not be extended to the circumstances of this case, for two related reasons.

First, all of this Court's overbreadth cases have involved parties who themselves had engaged—or sought to engage—in expressive activity. The doctrine ought not be extended farther, to parties like respondent, who have not engaged in expressive activity subject to the regulation under attack. The costs of a challenge like respondent's are more substantial than in an ordinary overbreadth case; a challenge like respondent's, if successful, will disable society from enforcing its laws even against those engaged in no expressive activity at all. It also may easily result in courts prematurely and perhaps unnecessarily deciding constitutional questions. In this case, for example, there is no reason to believe that the challenged trespass policy has any impact at all on expressive activity or that anyone seeking to engage in such activity on Whitcomb Court property has ever been denied permission to do so. Accordingly, an overbreadth challenge to a regulation by a party who has not himself engaged in expressive activity subject to the regulation should not be entertained.

Second, this Court has permitted overbreadth challenges to statutes that regulate speech or conduct closely related to

speech, but it has noted that the doctrine's rationales would not permit overbreadth challenges to laws of more general applicability that are in no way directed toward speech or to conduct closely related to speech. Such laws pose a lesser danger to First Amendment rights, and they thus do not call for the "strong medicine" of overbreadth challenges. Because the Housing Authority's trespass policy sweeps far beyond speech or speech-related conduct and was adopted for reasons having nothing to do with suppression of speech, it should not be analyzed for overbreadth. It would be particularly unwarranted to invalidate the trespass policy on overbreadth grounds to the extent that the policy regulates entirely nonexpressive conduct. For similar reasons, the policy would not in any event be *substantially* overbroad, even if an overbreadth challenge could otherwise be maintained in this case.

II. If the Court holds that respondent's overbreadth challenge may be entertained, the decision of the Virginia Supreme Court should nonetheless be reversed. That court held that the Housing Authority's trespass policy violates the First Amendment because it vests too much discretion in the manager of Whitcomb Court to determine whether those engaged in expressive activity will be permitted on the property. The court, however, erred in reaching that conclusion without determining whether the Whitcomb Court sidewalks, which once were ordinary city sidewalks, retain their character as a public forum.

If the property at issue remains a public forum, then the vesting of discretion in the manager presents serious First Amendment problems. But if the sidewalks of Whitcomb Court are not a public forum, then the government has substantially broader ability to regulate expression on it. Insofar as Whitcomb Court has become an area not generally open to the public, the government may vest discretion in a gatekeeper to permit entry only to those with legitimate

purposes for being there, just as it may do the same at a government-owned military base or office building. Nor does the fact that the streets of Whitcomb Court was at one time a public forum demand the conclusion that it retains that status; property that once was a public forum may surely be converted to another use.

United States v. *Grace*, 461 U.S. 171 (1983), establishes that merely enacting a law declaring speech off-limits in what was a public forum is insufficient to convert a public forum to another use. But this Court has not addressed what more is required before a government-owned property that was a traditional public forum has been converted to another use, such that the rules restricting government regulation in a public forum are no longer applicable. The Court ought not address that question in the first instance, without the benefit of a decision on the issue by the court below and on the thin record in this case. If the Court holds that respondent may bring a First Amendment overbreadth challenge in this case, therefore, the Court should reverse the decision of the Virginia Supreme Court and remand for further proceedings, so that the question whether the street on which respondent was arrested was a public forum may be addressed in the first instance by the courts below and with whatever further factual development is necessary.

ARGUMENT

I. RESPONDENT'S FACIAL CHALLENGE TO THE HOUSING AUTHORITY'S TRESPASS POLICY SHOULD NOT HAVE BEEN ENTERTAINED

At the time he was arrested, respondent was walking on a sidewalk located on Housing Authority premises. He stated that he was delivering diapers to his baby, who lived at the development. Pet. App. 32. He did not claim—and he has never claimed—that he was on the premises for any expressive purpose that would trigger First Amendment protection. He did not claim that he was handing out leaflets, that

he was organizing a demonstration, or that he was in any way trying to get a message across to the public.[2] Accordingly, respondent's conduct was not protected by the First Amendment's guarantee of freedom of expression, and the Housing Authority's trespass policy as applied to him—*i.e.*, its determination that it did not want to permit him to trespass on its property—did not intrude on any of his own First Amendment rights. Respondent's First Amendment challenge to the trespass policy may thus proceed, if at all, only as an overbreadth challenge—*i.e.*, only on the ground that the claimed unconstitutionality of the policy as it might be applied to others, who *are* engaged in First Amendment protected activity, is sufficient to make the policy unenforceable against him.

Such an overbreadth challenge does not lie in this case, for two related reasons. First, this Court has never held that a First Amendment overbreadth challenge may be brought by a party not engaging in expressive activity subject to the challenged regulation, and it ought not extend the doctrine now to permit such challenges. Second, this Court has cautioned against permitting First Amendment facial challenges to laws of general applicability that extend to conduct with little connection to speech. The Housing Authority's trespass policy is such a law, and respondent's facial overbreadth challenge to it accordingly should not be entertained.

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[2] Even had respondent alleged that he wanted to enter Whitcomb Court in order to carry on a conversation with someone, a policy that prohibited trespassing for that purpose would "not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional." *City of Chicago* v. *Morales*, 527 U.S. 41, 52-53 (1999) (Opinion of Stevens, J.); see *City of Dallas* v. *Stanglin*, 490 U.S. 19, 23-25 (1989).

A. The Overbreadth Doctrine Is A Limited Exception To The General Rule Permitting Only As-Applied Constitutional Adjudication

1. The traditional rule is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); see *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953) ("[E]ven though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly violated."). That rule is based on several rationales.

First, as-applied adjudication ensures that society's ability to enforce its laws is curtailed only where doing so would violate a constitutional command that the defendant's conduct must be protected. By contrast, overbreadth challenges eliminate society's ability to enforce laws even in cases in which the defendant's conduct is unprotected. See *Broadrick*, 413 U.S. at 615 (a holding that a law violates the First Amendment in an overbreadth case "prohibit[s] a State from enforcing the statute against conduct that is admittedly within its power to proscribe"). That curtailment of society's ability to protect itself from "harmful, constitutionally unprotected conduct," *ibid.*, is significant, and a court should not be "so ready to frustrate the expressed will of Congress or that of the state legislatures." *Barrows*, 346 U.S. at 256-257.

Second, while an as-applied challenge presents a court with a concrete factual setting in which to adjudicate the question whether the challenged regulation is genuinely inconsistent with the First Amendment, an overbreadth challenge deprives the court of such a concrete factual setting. Where a court can "focus[] on the factual situation"

before it, it has the opportunity to address "'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 768 (1982)). But where the court must "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows*, 346 U.S. at 256, reliable judgment becomes much more difficult.

Third, while an as-applied challenge requires a court to pass on a constitutional question because doing so is necessary to vindicate the Constitution with respect to the particular party before the court, overbreadth challenges can lead the Court to "unnecessary pronouncement on constitutional issues." *United States* v. *Raines*, 362 U.S. 17, 22 (1960). The court must address the constitutional challenge, even if the assertedly unconstitutional application of the statute on which the challenge is based never in fact arises or arises in a context in which different or narrower issues are presented.

2. Notwithstanding the above costs, because "the First Amendment needs breathing space," *Broadrick*, 413 U.S. at 611, overbreadth challenges under the First Amendment have been "deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972). In essence, the party before the court, whose conduct may be regulated consistently with the First Amendment, is permitted to represent the interests of third parties not before the court whose speech would be chilled by the prospect that the regulation would be applied to them.

Nonetheless, the Court has emphasized that "[a]pplication of the overbreadth doctrine * * * is, manifestly, strong

medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. See *Ferber*, 458 U.S. at 769. In light of its heavy costs, the Court has restricted First Amendment overbreadth challenges in a number of respects. The Court has held that overbreadth challenges may succeed only on a showing that the law's overbreadth is substantial. "[T]he scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (quoting *Broadrick*, 413 U.S. at 615). "Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable * * * conduct.'" *Ibid.* (quoting *Ferber*, 458 U.S. at 770 n.25). The Court has also held that the First Amendment overbreadth doctrine does not apply to commercial speech, see *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977), which is not easily chilled, and in the military context, see *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974).

B. An Overbreadth Challenge May Not Be Brought By One Not Engaged In Expressive Activity Subject To The Challenged Regulation

All of this Court's overbreadth cases have involved parties who engaged in, or sought to engage in, expressive activity subject to the challenged regulation. *E.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002) (restriction on door-to-door canvassing challenged by religious proselytizers); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002) (restriction on virtual child pornography challenged by parties who create erotic and nudist works); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992) (permit for private use of public property challenged by group that wanted to hold

demonstration); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (newsrack licensing scheme challenged by newspaper); *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (ban of all "First Amendment activities" challenged by party seeking to distribute religious literature); *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (law prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" challenged by person convicted for using such language) (citation omitted); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969) (parade permit ordinance challenged by demonstrators); *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940) (statutes prohibiting loitering with purpose to influence and picketing challenged by union picketer); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (licensing scheme for distribution of literature challenged by person distributing religious pamphlets).[3] The rule permitting overbreadth should not be extended to cases, such as this one, in which the party bringing the challenge has not engaged in expressive activity subject to the challenged regulation.

The costs of permitting such a challenge are high. If an individual who has not engaged in expressive activity subject to a regulation is permitted to bring an overbreadth challenge to that regulation, the damage to society's legitimate interest in enforcing its laws is even greater than in the

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[3] Even the cases in which this Court has ultimately rejected overbreadth challenges have involved parties engaged in expressive activity. *E.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002) (regulation of sexually explicit material on Internet challenged by organizations that maintain their own web sites); *Thomas* v. *Chicago Park District*, 534 U.S. 316 (2002) (permit scheme for gatherings in park challenged by parties seeking to hold political rallies); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity law challenged by booksellers and movie distributors); *New York* v. *Ferber*, 458 U.S. 747 (1982) (law prohibiting child pornography challenged by proprietor of bookstore); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) (statute regulating government employees' political activity challenged by employees who had engaged in such activity).

ordinary overbreadth case, in which the challenger was engaged in expressive activity. For if the overbreadth doctrine is widened to permit challenges like the one in this case, enforcement of the challenged law is precluded not only against those engaged in expressive conduct, but also against the necessarily even wider category of individuals who have no claim to expression at all.[4] In this case, for example, if respondent's challenge is permitted, the Housing Authority's trespass policy could be invalidated entirely, so that the drug dealers, their customers, and other criminals who were the original targets of that policy could not be prohibited from entering the grounds of Whitcomb Court. That result would follow, despite the fact that none of those individuals has any claim to being engaged in expressive conduct and no personal First Amendment interest to protect.

The risk of premature or unnecessary constitutional adjudication, which is a cost of any overbreadth challenge, is increased if the party bringing the challenge has not himself engaged in expressive activity. Although respondent can hypothesize about the existence of speakers whose exercise of their First Amendment rights would allegedly be chilled by the Housing Authority's trespass policy, the record in this case does not clearly disclose that any individual who wanted to enter Whitcomb Court to engage in expressive activity—protected by the First Amendment or not—has

[4] Similarly, where a party's expressive activity was subject to the challenged regulation, there is always the possibility of a narrowing construction that would carve out certain expressive activity from the reach of that regulation, or a partial invalidation. Cf. *Board of Trs. of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 484-485 (1989) (as-applied challenges to a restriction of speech should ordinarily be adjudicated before proceeding to an overbreadth analysis). But a party who has not engaged in expressive activity and is permitted to bring an overbreadth challenge has no such incentive to find a narrowing construction; such a party is likely to argue for the broadest possible invalidation of the challenged regulation, to ensure that it cannot be applied even to his, non-expressive conduct.

ever been, or would ever be, denied permission to do so.[5] See *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). Accordingly, cases like this one pose the risk that the Court must decide substantial constitutional questions under the First Amendment whose resolution is, in fact, wholly unnecessary. In light of the substantial costs of entertaining First Amendment overbreadth challenges to regulations by individuals not engaging in expressive activity subject to those regulations, this Court ought not extend the overbreadth doctrine to permit such challenges.

C. Facial Overbreadth Challenges May Not Be Brought To Laws Of General Applicability

There is a second, related reason why respondent's overbreadth challenge should not be entertained. Virtually all of this Court's overbreadth cases have involved challenges to laws that either regulate speech directly or regulate conduct closely associated with speech. See pp. 14-15, *supra* (citing

[5] When asked whether she has given permission to people who want to enter Whitcomb Court "to pass out flyers for example, or hold church related meetings," Ms. Rogers agreed with counsel's statement that "[s]ometimes you do and sometimes you don't." Pet. App. 101; see *id.* at 16. She went on, however, to state that "I do not deny anyone permission to hand out flyers, the ones that I have seen," *id.* at 102, that if it is "something [she is] uncomfortable with, [she] will refer it to [her supervisor]," *ibid.*, and that she also "refer[s]" matters "to the community council and they meet with the board and the residents to decide," *id.* at 101. In sum, her testimony establishes that she does not always personally grant permission. It does not concretely establish that anyone who has sought entry to Whitcomb Court to engage in expressive activity has ever been denied. Nor does it establish that anyone who has been engaged in expressive activity, whether with or without permission, has ever been arrested. J.A. 4-38, 46.

cases). Such laws are generally not susceptible to challenges such as this one, in which the party bringing the challenge has not engaged in expressive activity at all, because the regulation itself applies to few parties in that situation. Yet where the issue has arisen, this Court has stated that laws of general applicability, which apply to conduct that has little or nothing to do with speech, are not subject to facial overbreadth challenges, even though such laws could have an incidental effect on speech in particular instances. That principle precludes respondent's challenge in this case.

1. In *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 763-764 (1988), the Court entertained a facial challenge to an ordinance that gave the mayor of a city "unfettered discretion" to grant or deny applications for annual permits to place newsracks on city property and held that the ordinance was unconstitutional. 486 U.S. at 772. The Court held that facial challenges may be brought to laws that "have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of * * * censorship risks." *Id.* at 759. The Court held that, because the newsrack ordinance had to do with the distribution of newspapers, it satisfied that standard.

The Court in *City of Lakewood*, however, distinguished "laws of general application that are not aimed at conduct commonly associated with expression," such as "a law requiring building permits" or "a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property." 486 U.S. at 760-761. The Court noted that facial challenges to such laws of general applicability would not be warranted, notwithstanding that they could be applied in violation of the First Amendment in particular cases, such as where an unpopular newspaper is refused a building permit or a soda vendor who has criticized the municipal government is denied a permit to place a

vending machine on public property. *Id.* at 761. As the Court explained, "such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Ibid.* See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 860 (1970) ("[T]he primary conduct which is affected by the law at issue must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the [First] amendment" in order for the overbreadth doctrine to be applied.).

2. Based on the above principles, the Court has generally entertained overbreadth challenges only to laws that undoubtedly target expression. See pp. 14-15, *supra* (citing cases). The limits of that principle involve cases such as *Thomas* v. *Chicago Park District*, 534 U.S. 316 (2002), and *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992). *Thomas* involved a facial overbreadth challenge to an ordinance that required a permit for any gathering of more than fifty persons in a public park. *Forsyth County* involved a challenge to an ordinance that was adopted "[a]s a direct result" of two street demonstrations and required a permit and fee for "parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." 505 U.S. at 126 (citation omitted). Although the Court did not in either case address whether the challenged ordinances were sufficiently targeted at speech to satisfy *City of Lakewood*, the permit requirements in both cases applied not only to expressive activity, but to activity with little or no expressive component. At the same time, both ordinances appear to have applied solely to gatherings of groups of people in traditional public forums, and the ordinance in *Forsyth County* was specifically adopted as a result of such gatherings. Gatherings of people in a public forum are a characteristic of expressive activity and a traditional

function of public parks and streets. Cf. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak * * * and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The targeting at gatherings in a public forum would suggest that the ordinances in both cases regulated conduct that "ha[d] a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of * * * censorship risks." *City of Lakewood*, 486 U.S. at 759.[6]

This case, however, involves a trespass policy that, as the Virginia Supreme Court noted, "is designed to punish activities that are not protected by the First Amendment." Pet. App. 13. The policy was adopted "[i]n an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an 'open-air drug market.'" *Id.* at 3. See *id.* at 29 n.1 (Housing Authority brochure listing "goals of street privatization" as, *inter alia*, "[t]o make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents," and "[t]o ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity"). The trespass policy punishes conduct—the entry on to

[6] In *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Court addressed First Amendment challenges to breach-of-the-peace statutes as applied to the conduct of defendant civil rights demonstrators. *Cox*, 379 U.S. at 544-552; *Edwards*, 372 U.S. at 234-236. At the end of the Court's discussion in each case, it noted that the statutes would also be facially unconstitutional for overbreadth. *Cox*, 379 U.S. at 551-552; *Edwards*, 372 U.S. at 238. As the Court later explained in *Broadrick*, however, "[t]hese additional holdings were unnecessary to the dispositions of the cases" and were not relied on in a later case addressing a conviction under the same breach-of-the-peace statute at issue in *Cox*. 413 U.S. at 614 n.13 (internal quotation marks omitted).

Housing Authority property by people not authorized to be there—not speech. Unlike in *Thomas* or *Forsyth County*, the vast bulk of the conduct the Housing Authority trespass policy targets has nothing to do with expressive activity.

Like any trespass law, the trespass policy might on occasion apply to demonstrators, leafletters, or others attempting to engage in protected activity, and it could be unconstitutionally applied in those instances. See, *e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946) ("Insofar as the State [through its trespass law] has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand."). But the Housing Authority's trespass policy by its nature is targeted at *anyone* who seeks to enter Whitcomb Court, and in particular at drug dealers, their customers, and other criminals who had frequented the property. Accordingly, the trespass policy, like the laws of general applicability the Court discussed in *City of Lakewood* or the trespass law in *Marsh* v. *Alabama*, applies very broadly to conduct that has little to do with speech. A First Amendment challenge to such laws should not be entertained in the absence of a claim of "actual misuse" in a given case. *City of Lakewood*, 486 U.S. at 761.

At the very least, overbreadth analysis should not encompass the potential invalidation of a general statute in its applications to conduct that has no arguable connection to speech or expression. Even if the statute has some speech-related applications and all of those applications could be challenged (and invalidated) through overbreadth doctrine, non-speech-related applications of the law should be left untouched. In this case, that would mean that, at a minimum, non-speech-related applications of the trespass policy at Whitcomb Court—that is, applications to conduct such as that engaged in by respondent—could not be challenged and facially invalidated under overbreadth principles.

D. The Housing Authority's Trespass Policy Is Not In Any Event Substantially Overbroad

If respondent, as a party who did not engage in expressive activity subject to the Housing Authority's trespass policy, is permitted to bring an overbreadth challenge to that policy, the challenge should in any event be rejected because the policy is not substantially overbroad. The overbreadth of the policy—the extent to which it actually affects constitutionally protected speech—is at most uncertain and marginal. By contrast, its plainly legitimate sweep extends to all instances in which the policy bars those who have no legitimate business or social purpose and who are not engaging in First Amendment protected activity from entering Whitcomb Court. Because the overbroad reach of the Housing Authority's trespass policy thus likely extends only to "marginal applications," *Ferber*, 458 U.S. at 770 n. 25 (citation omitted), and it has no "embracing sweep * * * over protected expression," *id.* at 771, it is not substantially overbroad.[7]

II. EVEN IF RESPONDENT MAY BRING THIS OVERBREADTH CHALLENGE, THE VIRGINIA SUPREME COURT ERRED IN DETERMINING THAT THE HOUSING AUTHORITY'S TRESPASS POLICY VIOLATES THE FIRST AMENDMENT

The Court of Appeals of Virginia, the intermediate state appellate court, held that the streets and sidewalks of Whitcomb Court were a public forum, Pet. App. 33-40, but see *id.* at 49-53 (dissenting opinion), and that the trespass policy could not pass the strict standard of scrutiny applicable to regulations forbidding access to such a forum, *id.* at 40-43. The Virginia Supreme Court "recognize[d] that the Court of Appeals decided this case on the basis that the Housing Authority's private streets constitute a public forum," but the court stated that it "need not resolve this issue * * * and we will reserve consideration of this issue for another day." *Id.* at 16. In fact, the legitimacy under the First Amendment of the Housing Authority's trespass policy likely turns on the forum analysis of the public property to which it was being applied. Accordingly, if this Court reaches the merits of respondent's First Amendment claim, it should reverse the Virginia Supreme Court's determination that the Housing Authority's trespass policy violates the First Amendment and remand for further appropriate proceedings.

A. The Constitutionality Of The Regulation In This Case Likely Turns On The Forum Classification Of The Government Property At Issue

1. "Th[is] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). "To ascertain what limits, if any, may be placed on protected speech," the Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988); see *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion). Indeed, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the

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[7] This Court has explained that the function of facial overbreadth adjudication, "a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615. The Housing Authority's trespass policy regulates conduct—entry on to Housing Authority property—not speech. Accordingly, the scope of the overbreadth doctrine as it applies to such a policy is "attenuated."

property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

2. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45. Among the restrictions the First Amendment imposes on governmental regulation in such a forum is that officials must not be vested with unfettered discretion to regulate expressive activity.[8] But "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* at 46. In such a location, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Ibid.* "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

A corollary to that proposition is that, while this Court has invalidated laws that granted too much discretion to public officials to decide who would gain access to traditional First Amendment forums such as public streets and parks, the Court has never imposed similar requirements on regulations restricting access to nonpublic forums. See *Hale* v. *Department of Energy*, 806 F.2d 910, 917 (9th Cir. 1986). In *Greenburgh Civic Ass'ns*, for example, the Court held that authorized postal letterboxes are not public forums and that the postal service accordingly may limit the rights of others

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[8] See, *e.g.*, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-764 (1988); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969); *Kunz* v. *New York*, 340 U.S. 290, 293-294 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

to deposit materials in such boxes. In reaching that conclusion, the Court specifically referred to the line of cases in which it had "not hesitated in the past to hold invalid laws which it concluded granted too much discretion to public officials" in traditional First Amendment forums. 453 U.S. at 130-131. But, having concluded that letterboxes are not public forums, the Court also concluded that those standards do not apply to letterboxes. *Id.* at 131 ("[W]e do not believe the First Amendment requires us to make that leap.").

The Court's conclusion in *Greenburgh Civic Ass'ns* was correct. Governments own and operate a wide variety of different types of property, including office buildings, housing projects, military bases, law enforcement facilities, and many more. Vesting a gatekeeper at a public park with discretion to permit or deny entry based on the gatekeeper's determination whether a person has an otherwise unspecified valid purpose would likely run afoul of this Court's public forum cases. But no case of this Court suggests that vesting an official at a publicly owned office building or apartment complex with discretion to determine whether a visitor seeks entry for a valid business or social purpose would violate the First Amendment. Indeed, "[t]here is little doubt that in some circumstances the government may ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises." *United States* v. *Grace*, 461 U.S. 171, 177 (1983); see *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jailhouse driveway not public forum); *Daniel* v. *City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (public housing property is "nonpublic forum," because "[t]he official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas," and "in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and

those conducting official business"), cert. denied, 515 U.S. 1132 (1995).

3. A governmental limitation on entry must nevertheless be reasonable and unrelated to a purpose to suppress speech because of disagreement with the speaker's view. See *Perry*, *supra*. Those requirements are satisfied here. The Housing Authority's trespass policy is reasonable as a means to help protect residents of Whitcomb Court from the drug dealers and criminals preying on them, and the desire to attack drug trafficking and other criminal activity at Whitcomb Court has nothing to do with a desire to suppress speech. Accordingly, if the Whitcomb Court property at issue in this case is not a public forum (or is not a forum at all), the government may properly vest the manager of the property with much broader authority to permit or deny entrance than would be permitted with respect to a public forum. How broad the discretion may be must be evaluated in light of particular facts. But at the threshold, a court must determine whether the property is a public forum.

B. The Virginia Supreme Court Erred Because It Failed To Decide Whether The Property Was A Public Forum

The Virginia Supreme Court erred in holding the official discretion in this case unconstitutional without first determining whether the Whitcomb Court property is a public forum. Nor is the status of the property entirely clear on this record. Neither the physical character of the property nor the fact that it likely was a public forum in the past is decisive in determining whether it is a public forum now. The issues that are decisive were not reached by the Virginia Supreme Court, and this Court ought not address those issues in the first instance.

1. Although respondent was arrested on a sidewalk, not all sidewalks are public forums. "The mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727 (plurality opinion). In *Greer* v. *Spock*, 424 U.S. 828, 831 (1976) (citation omitted), for example, regulations precluded "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" on a military base and also precluded "distribution or posting of any publication * * * without prior written approval" of the base commander. Unrestricted areas of the base, however, were otherwise freely open to the public on paved roads and footpaths, and no guard was ordinarily posted at the entrance. *Id.* at 830. The Court nonetheless held that the unrestricted areas of the base were not a public forum, *id.* at 835-837, and that the regulations prohibiting expressive activities were constitutional on their face and as applied to prohibit electioneering by civilians. *Id.* at 838. See *Kokinda*, 497 U.S. at 727 (plurality opinion) (noting that in *Greer* "[t]he presence of sidewalks and streets within the [military] base did not require a finding that it was a public forum"); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985) (military base not public forum). Accordingly, under *Greer*, the mere fact that the area where respondent was walking in Whitcomb Court has the physical characteristics of a sidewalk does not establish that it is a public forum.

2. The fact that the sidewalk on which respondent was walking had once been a public sidewalk also does not establish that it is presently a public forum. The government may convert a traditional public forum into a nonpublic forum, so long as its actions are reasonable and taken for a legitimate purpose, and so long as it takes appropriate steps to make clear the changed nature of the forum. See *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1130 (10th Cir. 2002) ("The mere fact that a space is on what used to be a public street does not automatically render it a public forum."); *Hawkins* v. *City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir.) ("The government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its

public forum status."), cert. denied, 528 U.S. 871 (1999). Indeed, "[i]n some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring in the judgment). Otherwise, "the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require[.]" *Id.* at 699-700.

3. What is decisive in determining the forum classification of the sidewalk on which respondent was arrested is the extent to which it has in actual fact been closed off to the public, such that it has lost its former character as a public sidewalk. This Court noted in *Grace* that sidewalks "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." 461 U.S. at 179. That was critical in *Grace* with respect to the public sidewalks surrounding the Supreme Court grounds, because those sidewalks "are indistinguishable from any other sidewalks in Washington, D.C." *Ibid.* As the Court noted, distinguishing the sidewalk in *Grace* from the sidewalk on the military base in *Greer*, the sidewalk in *Grace* had "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 179-180. Under those circumstances, the Court ruled that Congress had not succeeded in converting the sidewalks into a nonpublic forum simply by enacting a statute prohibiting certain expressive activities: Congress cannot "transform the character of the property by the expedient of including it within the statutory definition of

what might be considered a non-public forum parcel of property." *Ibid.*

Grace establishes that sidewalks are presumptively public forums, but *Greer* establishes that that presumption may be overcome. 461 U.S. at 179. Aside from *Grace*, this Court has not considered the analysis that is applicable when the government seeks to turn property that was a public forum to another use. Among the factors to consider in that analysis would be (1) whether the sidewalk and street in question are, as a practical matter, closed to the public; (2) whether the government has taken sufficient steps to make that closure clear to the public; and (3) whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum. See *First Unitarian Church of Salt Lake City*, 308 F.3d at 1130-1131; *Hawkins*, 170 F.3d at 1287-1288; see also *Kokinda*, 497 U.S. at 728 (plurality opinion) ("location and purpose" of the property); *International Society for Krishna Consciousness*, 505 U.S. at 698-699 (Kennedy, J., concurring in the judgment).

4. The 6-5 division in the intermediate state appellate court was based largely on differing interpretations of the record concerning whether the street on which respondent was arrested remained a public forum. Compare Pet. App. 38 (majority opinion) ("Because the streets appear no different from other streets in Richmond and serve the same function they did prior to privatization, we can discern no reason why they should be treated any differently from any other street or sidewalk.") (internal quotation marks and citation omitted) with *id.* at 52 (dissenting opinion) (there was "notice to the residents and the public at large in the form of repeated and obvious signage that the streets and sidewalks were no longer 'public' in character"; "there is absolutely no evidence that the streets and/or sidewalks of the Whitcomb Court property remained open to a public flow

of traffic, as the majority suggests"). The Virginia Supreme Court did not reach that issue, and this Court ought not, as an original matter, decide whether, on the limited record in this case, the Housing Authority succeeded in its effort to convert the sidewalk at issue in this case into a nonpublic forum. Thus, even if the Court were to determine that a party in respondent's position may bring an overbreadth challenge, the Court should reverse the decision of the Virginia Supreme Court and remand for further proceedings, including a classification, under the public forum doctrine, of the sidewalk in Whitcomb Court on which respondent was arrested.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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